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IN THE

Supreme Court of the United States

October Term, 1963

No. 144

HOMER L. WOXBERG, SR., and WAYNE FRANKLIN DYKES,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	3
Statute involved	4
Statement of the case	4
1. Introductory statement	4
2. The evidence	6
3. The theory of the court below	18
Argument	20
I.	
The Circuit court by failing to find on a material question of law and fact has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision	20
II.	
The decision below is in conflict with the decision of this court in United States v. Carter, 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957)	27
III.	
The questions are substantial and important	29
Conclusion	38

INDEX TO APPENDIX

Appendix "A" Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Dorchester v. Dorchester, 23 N. E. 1043, 121 N. Y. 156	20
Gardner v. Louisiana, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207	36
Great Atlantic and Pacific Tea Co. v. Super-Market Equipment Corp., 340 U. S. 147, 71 S. Ct. 127, 95 L. Ed. 162	21
Hooker v. Hoey, 27 F. Supp. 489	24
Kennedy v. Porter, 17 N. E. 426, 109 N. Y. 526	20
Kennet v. United Mine Workers of America, 183 F. Supp. 315	24
Legnard v. Rhoades, 40 N. E. 964, 156 Ill. 431	20
Morisseta v. United States, 342 U. S. 246, 72 S. Ct. 240, 96 L. Ed. 288	30
O'Leary v. Brown-Pacific-Maxon, 340 U. S. 504, 71 S. Ct. 470, 95 L. Ed. 483	21
Thompson v. Louisville, 362 U. S. 199, 8 S. Ct. 624, 4 L. Ed. 654	36
United States v. Breeser, 131 Fed. 915, rev. 143 Fed. 250	30
United States v. Carter, 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 776	3, 18, 19, 22, 26, 27, 28, 30, 38
United States v. Youtsey, 91 Fed. 864, rev. 97 Fed. 937	30
Winkleman v. General Motors Corp., 39 F. Supp. 826	37

Rules	Page
Rules of the Ninth Circuit Court, Rule 26(1)	2

Statutes

United States Code, Title 18, Sec. 656	30
United States Code, Title 18, Sec. 3231	2
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 29, Sec. 501(a)	29, 37
United States Code, Title 29, Sec. 501(b)	37
United States Code, Title 29, Sec. 501(c)	1, 2, 3, 4, 18, 21, 22, 23, 26, 29, 30, 31, 33, 37
United States Constitution, Art. I, Sec. 9(3)	18, 21, 26
United States Constitution, Fifth Amendment	36
United States Constitution, Fourteenth Amendment	36

Textbooks

Clark and Marshall, Crimes, pp. 741, 759	30
Georgetown Law Journal, Dean Frank J. Duncan, Sec. 501	33
48 Georgetown Law Journal (1959), p. 296	34
Symposium on the Labor-Management Reporting and Disclosure Act of 1959, pp. 526-527, Tulane University, 1961	32

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Homer L. Woxberg, Sr. and Wayne Franklin Dykes, defendants and appellants below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming a judgment of the United States District Court for the Southern District of California convicting petitioners of violating Title 29, United States Code, Section 501(c), the Labor-Management Reporting and Disclosure Act of 1959, more commonly referred to as the Landrum-Griffin Act.

Opinion Below.

The opinion of the Court of Appeals is reported in the Advance Sheets of the Federal Reporter, 329 F. 2d 284 (1964). It is printed in Appendix "A" to this petition. There was no opinion in the District Court.

Jurisdiction.

1. The date of the judgment sought to be reviewed is, and it was entered in the Court of Appeals on, March 12, 1964. Said judgment reversed appellants' convictions under Count I and Appellant Woxberg's convictions under Count IX and X and affirmed both appellants' conviction under Count II to which this petition for certiorari is directed. [App. "A," *infra*, p. 17.]

2. A petition for rehearing as to Count II was filed by appellants on April 10, 1964. An order denying said petition for rehearing was rendered and filed on May 4, 1964 by the Circuit Court of Appeals.

Thereafter, pursuant to application by appellants under Rule 26(1) of the Ninth Circuit Rules, an order was granted staying the spreading of the mandate herein pending the filing, consideration and disposition by this Court of the within petition.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 United States Code, Section 1254(1).

4. The basis of the District Court's jurisdiction is that this was the trial of an indictment returned by a Federal Grand Jury charging offenses against the laws of the United States, *i.e.*, violations of Section 501(c) of Title 29 of the United States Code. The statutory provision sustaining the jurisdiction of the District Court is 18 United States Code, Section 3231.

5. The grounds upon which the jurisdiction of this Court is invoked are that the Court of Appeals, in affirming as to Count II has decided an important question of law arising under the criminal laws of the

United States, to wit, the Landrum-Griffin Act, which has not been interpreted and which should be settled by this Court; and has rendered a decision in conflict with the decision of this Court in *United States v. Carter*, 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957); and, by failing to find on a material question of law and fact, has, it is respectfully submitted, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Questions Presented.

1. Must the Circuit Court of Appeals make a finding as to whether or not the trust in the instant case, the Severance Fund, a pension plan established by appellants as officers of the Local Union for the paid employees of the Union, was a valid trust in determining whether or not appellants violated Section 501(c) in authorizing and directing the payment of Union funds ($220.00) to the administrator of the trust for services rendered in auditing and distributing the assets of said fund to the beneficiaries—paid employees of the Union?

2. If the Circuit Court was required to make that finding, and if the finding as a matter of law is that the trust in question was valid, are the beneficiaries thereof entitled to the assets of the trust in a gross amount, therefore placing the obligation on the union to pay the cost involved in distributing and terminating said trust under the authority of *United States v. Carter*, 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957)?

3. Irrespective of the application of *United States v. Carter, supra*, is the decision of the Ninth Circuit

in error in holding that there was sufficient evidence to support the finding by the District Court that appellants fraudulently and without consent misappropriated union funds in violation of Section 501(c) in authorizing and directing the payment of $220.00 to the administrator of the trust for services rendered in auditing and distributing the assets of said trust?

Statute Involved.

The statute involved in this matter is Section 501(c) of Title 29, United States Code, the Labor-Management Reporting and Disclosure Act of 1959, commonly known and referred to as the Landrum-Griffin Act. So far as is material here, it reads as follows:

> "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both."

Statement of the Case.

1. Introductory Statement.

Appellants were officers of Line Drivers Local No. 224 of the International Brotherhood of Teamsters Union. They, together with two other defendants, Hester and Barnes, also paid officers of the Union, were indicted under a twenty-count indictment for embezzlement and unlawful conversion of union funds under Section 501(c). After trial by jury, Appellant Woxberg was convicted of Counts I, II, IX and X.

Appellant Dykes was convicted under Counts I and II. Appellants were found not guilty of all remaining counts. [Clk. Tr.[1] pp. 195, 196.]

The decision of the Ninth Circuit reversed the conviction of both appellants under Count I and reversed Appellant Woxberg's conviction of Counts IX and X. Counts IX and X are, therefore, no longer material to the instant petition. To determine the correctness of the ruling as to Count II, however, it is necessary, as will hereinafter be demonstrated, that this Court consider and review the evidence introduced principally under Count I.

Count I was based on the dissolution of a trust fund denominated and more commonly referred to as the "Severance Fund" established by the Executive Board of the local union as a pension plan for its paid employees. [Clk. Tr. p. 2; Ex. E.] Count II was based on the payment of $220.00 by the union for costs and expenses incurred in the termination of the Severance Fund and for services rendered by the accountant and administrator of the Severance Fund in auditing and distributing the fund to the beneficiaries of the trust. [Clk. Tr. p. 3; Ex. 2.]

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[1]The record in the Court of Appeals was typewritten. It consists of two parts: One designated "Volume I" contains the indictment, judgment of the District Court, Index of Exhibits offered and received in evidence, and other papers in the District Court record. It is referred to here by the abbreviation "Clk. Tr." followed by the number of the page being referred to. The other part, "Volume II", consists of twenty volumes of the Daily Reporter's Transcript of the trial in the District Court. It is referred to here by the abbreviation "R. Tr." followed by the page and line numbers of the part to which the reference relates. Any reference to exhibits will be to the original exhibits, the pertinent ones of which have been transmitted to this Court as a part of the record of the Court of Appeals.

Therefore, in order to determine the legality of the payment by the union of $220.00 under Count II, it will be necessary to understand the manner in which the Severance Fund was created, administered and dissolved.

2. The Evidence.

The Local was first established in September 1943 as a Trusteeship under the International Teamsters Union. Appellant Woxberg was appointed by the International Union as the trustee-receiver and had full authority to manage and control the affairs of the Trusteeship. [R. Tr. p. 1189, line 22, to p. 1192, line 2.] In November 1947, the Local Union graduated from its trusteeship and management of the business and affairs of the Local were turned over to its members by the International Union. The Local, at its first general membership meeting on November 23, 1947, adopted the rules and regulations by which the affairs of the Local were to be conducted. [Ex. 43, R. Tr. p. 1204a, line 15, to p. 1206, line 25.] The minutes of the general membership meeting of November 23, 1947 reflect that the following rules and regulations were adopted:

> "Election of officers shall be conducted as provided in the International constitution, and shall be elected for the following terms of office: President, 1 year; vice-president, 1 year; recording secretary, 1 year; secretary-treasurer, 5 years; one trustee, 1 year; one trustee, 2 years; one trustee, 3 years.
>
> "(2) The administration, supervision and direction of the affairs of Local No. 224 shall be vested in the secretary-treasurer and the president, subject to the approval of the executive board.

"(3) All employees of Local No. 224 shall be employed and directed by the secretary-treasurer and president.

"(4) Salary and expenses of all employees shall be set and approved by the secretary-treasurer and the president, subject to the approval of the executive board. No action shall be taken by the Executive Board or the membership meetings of Local No. 224 that in any way effects policy or expenditures of money in the absence of the secretary-treasurer and president.

"(5) The office of secretary-treasurer shall be the only elective paid position on the executive board of the local union.

"(6) In the case of a vacancy in the executive board of the local, such vacancy shall be filled by the majority action of the executive board for the unexpired term.

"(7) The executive board shall be empowered by the local union to conduct all the business of the local between regular meetings.

"(8) It will take two-thirds (2/3) majority vote of entire membership to change the above rules." [Ex. 43; R. Tr. p. 1205, line 9, to p. 1206, line 16.]

It was under these regulations and authority that the Severance Fund was later established.

On February 28, 1954, the executive board first adopted a resolution calling for the creation of a pension fund for the paid officers and paid employees of the union, which included appellants. [Ex. 44.]

There was no requirement under the rules and regulations of the Local Union that the minutes of the executive board and the resolutions adopted by them be brought to the attention of the membership at any general membership meeting. Notwithstanding this fact, a reading of the executive board minutes was a regular part of each general membership meeting. Following a reading of the minutes of the executive board, the motion concerning the pension plan went over to new business. A motion was made from the floor, under new business, to approve this resolution of the executive board. After some discussion a motion was made to table the matter until the next meeting. The objection voiced by some of the members from the floor was that before any pension plan be established for the paid Union officers and employees, a pension plan first be obtained for the general membership of the Union from their employers.[2] [R. Tr. p. 280, line 9, to p. 282, line 8; p. 1235, line 5, to p. 1241, line 9; Ex. 44.]

The minutes of the general membership meeting of February 28, 1954 reflect that appellant Woxberg explained in detail the purpose of the proposed pension plan for the officers and employees of the Local Union. In particular it was pointed out that the moneys placed in the pension fund would be in lieu of increase in wages for the paid Union employees for the next ten years, except for inflationary periods. [R. Tr. p. 1235, line 5, to p. 1236, line 7; Ex. 44.] At the next general

[2]The evidence disclosed without contradiction that the meetings of the general membership were conducted in a democratic fashion, and if any member had anything he wanted to say, he was given the opportunity to speak and to present to the general membership any matter which he wanted to be considered. [R. Tr. p. 396, line 24, to p. 399, line 18.]

membership meeting on March 28, 1954, a motion was made, seconded and carried to table the pension plan for the paid employees indefinitely. [Ex. 44; R. Tr. p. 282, lines 9-25; p. 1248, line 11, to p. 1249, line 29.]

Immediately thereafter, the officers of the Union began negotiations with the employers for the purpose of establishing a pension plan for the regular members of the Union, which pension plan was ultimately obtained. [R. Tr. p. 1244, line 11, to p. 1246, line 12.] On March 27, 1955, while these negotiations for a pension plan for the rank and file were still in progress, the executive board, at its regular meeting of that date, passed the following resolution:

> "After some discussion involving pensions and severance pay for the officers and office manager, a motion was made and seconded to concur in the request of the secretary authorizing him to have an attorney draft the trust agreement covering severance pay for the paid officers and office manager and deposit the insurance refunds in the severance trust. Motion carried." [Ex. 44.]

At the general membership meeting of the same day, the minutes of the executive board meeting of that morning were read and approved. [R. Tr. p. 284, line 18, to p. 286, line 23; p. 1252, line 1, to p. 1253, line 25; Ex. 44.]

Prior to the executive board meeting of March 27th, appellant Woxberg as secretary-treasurer of the Union, had conferred with Richard Perkins, a lawyer, as to whether or not such a fund could be established in accordance with the rules and regulations of Local No. 224. [R. Tr. p. 1858, line 2, to p. 1860, line 4.] Mr.

Perkins advised appellant Woxberg that such a fund could be legally established. [R. Tr. p. 1833, line 24, to p. 1834, line 13.] Mr. Perkins then prepared a trust agreement entitled "Agreement and Declaration of Trust, Severance Fund Line Drivers Local 224". This trust agreement, Exhibits 61 and E, consisted of 8 pages and provided in part as follows:

> "1. *Purpose of Trust:*
>
> "(a) The membership of Line Drivers Local No. 224, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter referred to as 'Local 224', an unincorporated association, has by resolution duly adopted voted to make contributions to a severance fund to provide a measure of security for certain paid officers and employees of Local 224 and provide benefits for them similar to some of the benefits available to employees of numerous private employers under pension, retirement, profit-sharing, and stock bonus plans;
>
> "(b) Local 224 has directed that insurance refunds payable to it from time to time shall be contributed for the aforesaid purpose, together with such other monies as may be designated for that purpose in future; and
>
> "(c) It is desired to establish definite and orderly procedures through the device of a trusteeship to carry out the aforesaid purpose."

In addition thereto, there were the usual provisions covering such a trust including a designation of the requirements for becoming a beneficiary under the trust. [See Ex. E; R. Tr. p. 1220, line 5, to p. 1231, line

17.]. On April 1, 1955, the Trust Agreement was signed and approved by all of the then beneficiaries, defendants Hester and Barnes, the office manager, Gladys Rang and appellants Woxberg and Dykes. The latter three signed in capacity as trustees. [Ex. E.]

On April 3, 1955, at a special meeting of the executive board, the following motion was made and carried: "The secretary read the Severance Fund Trust Agreement. The motion was made and seconded the Severance Fund Trust Agreement be approved effective April 1. Motion Carried." [Ex. 44; R. Tr. p. 288, line 1, to p. 290, line 7.] While there was a special general membership meeting on April 3, 1955, the only matters that were discussed there concerned an anticipated strike. [R. Tr. p. 1258, line 4, to p. 1269, line 24; Ex. 44.]

At the next regular general membership meeting, April 24, 1955, the minutes of the executive board and general membership meeting of March 27, 1955 were read and approved, and the minutes of the special executive board meeting of April 3, 1955 concerning the reference to the "Severance Fund Trust Agreement" was read and approved. No reference was made of any of these matters under the heading of new business. [Ex. 44; R. Tr. p. 1260, line 25, to p. 1264, line 6.]

The resolution adopted by the executive board on March 27, 1955, not only authorized the drafting of the Trust Agreement, but also authorized the deposit of insurance refund checks in the trust fund account. [Ex. 44.] Paragraph 1(a) of the Trust Agreement [Ex. E], prepared pursuant to this authority, provided that the funds necessary to establish the trust were to come from certain insurance refund checks belonging to Local 224.

Beginning in 1955, the refund checks were deposited in an account at the California Bank under the name of "Severance Fund Line Drivers Union No. 224". [Ex. 1.] The refund checks deposited in the Severance Fund account were as follows:

(1) Exhibit 29, Check dated March 1, 1955 in amount of $8,143.43 payable to Line Drivers Local No. 224 [R. Tr. p. 23, lines 1-10];

(2) Exhibit 30, Check dated February 23, 1956 in the amount of $7,838.02 made payable to Line Drivers Local No. 224 [R. Tr. p. 23, lines 16-25];

(3) Exhibit 31, Check dated March 7, 1957, in the amount of $8,149.40 payable to Line Drivers Local No. 224 [R. Tr. p. 24, lines 1-8];

(4) Exhibit 32, Check dated February 4, 1958, in the amount of $6,707.48 payable to Line Drivers Local No. 224. [R. Tr. p. 24, lines 9-14.]

In each instance the refund check was endorsed for deposit in the "Severance Fund, Line Drivers Union Local 224", and went directly into the Severance Fund account without passing through the regular Union account. [R. Tr. p. 24, line 22, to p. 25, line 7; p. 37, line 18, to p. 39, line 20.]

On February 23, 1958, the executive board, having received a better offer from another insurance company which would effectuate a savings to the Local Union on insurance premiums for the same coverage, voted to change the company under which the rank and file

group insurance policy was held. As a result there were no further refund checks paid to the Local Union. Thereafter the Severance Fund continued with the funds already on deposit and no further moneys of the Union were transferred to this account. [R. Tr. p. 1265, line 18, to p. 1269, line 2.]

The funds were invested almost entirely in second trust deeds and were supervised by one Larry McBride (the recipient of the $220.00 under Count II, *infra*), a man thoroughly familiar with such investments. [R. Tr. p. 113, line 22, to p. 114, line 8.] No question was raised at the trial that the Severance Fund was ever maintained in other than a proper manner, or that investments were improperly made. At the time it was ultimately dissolved on November 2, 1959, and the cash and trust deeds distributed among the then beneficiaries, the fund was worth approximately $35.000.00. [R. Tr. p. 209, lines 10-24.] It is on this amount that the government based the allegation of embezzlement under Count I. [Clk. Tr. p. 2.] This, however, did not include the $5,958.00 distributed to the estate of Gladys Rang, upon her death, which was done in accordance with the terms of the Trust Agreement. [R. Tr. p. 208, lines 12-13.] The same formula for determining each beneficiary's interest in the Severance Fund when dissolved in November, 1959, was also used in determining Gladys Rang's share in the fund at the time of her death. [R. Tr. p. 167, lines 20-21.]

The Landrum-Griffin Act became law on September 14, 1959. On September 27, 1959, the executive board, at the specific instance and request of appellant Woxberg who had conferred with union lawyers concerning the Landrum-Griffin Act and its ramifications [R. Tr. p. 1289, line 7, to p. 1290, line 18], adopted the following resolution:

> "Motion made and seconded that the Secretary-Treasurer be authorized in conjunction with the attorney to discontinue payments to the Severance and Pension Plan Funds and car allowances to the paid employees and to distribute these monies to the employees as salary, thereby placing the responsibility of reporting to the government on the employee involved. Motion carried." [Ex. 44.]

It was explained to the general membership by appellant Woxberg that because of the requirements of the Landrum-Griffin Act, calling for the Union to report all its expenditures and other financial transactions periodically and in detail, it would be simpler to lump together as salary the car allowances and other fringe benefits, thus placing the responsibility upon the individual employees to report to the government as income these receipts on their income tax returns. [R. Tr. p. 291, line 21, to p. 294, line 15; p. 1290, line 22, to p. 1295, line 18.]

Significantly, in connection with the Severance Fund, the executive board was advised by appellant Woxberg that this fund could be carried on as a private fund, thereby relieving the Union of the necessity of making such a report to the government under the Landrum-Griffin Act. [R. Tr. p. 1301, lines 3-13.] Both appellant Woxberg and Mr. Perkins, the attorney for the

Severance Fund, testified that prior to the adoption of this resolution by the executive board, Mr. Perkins had been asked by appellant Woxberg as to whether or not it was proper to dissolve the fund and distribute the corpus of the fund in proper proportions to the beneficiaries. Each testified that Mr. Perkins advised appellant Woxberg that the fund could be dissolved in the same manner in which it had been created, that is by unanimous consent of all of the beneficiaries, the trustor (the Local Union) and the trustees. [R. Tr. p. 1317, line 1, to p. 1319, line 9.] Mr. Perkins did testify, however, that since he was not familiar with the by-laws and regulations of the Local Union, with respect to who had the authority to consent to the dissolution in behalf of the Union, it would be better to have it approved by the general membership. [R. Tr. p. 1848, line 7, to p. 1850, line 8; p. 1643, lines 7-18.] Accordingly, at the general membership meeting of September 27, 1959, the following occurred under the heading of new business:

> "Motion was made and seconded that the Secretary-Treasurer be authorized in conjunction with the attorneys to discontinue payment to the pension plan and car allowance to paid employees and distribute these moneys to the employees as salary, thereby placing the responsibility of the reporting to the government on the employee involved. Motion carried." [Ex. 44; R. Tr. p. 294, lines 3-15; p. 1314, line 24, to p. 1315, line 4.]

It should be noted that although it was not necessary under the by-laws of Local 224 to present this matter to the general membership for its approval, it was nevertheless done by appellants as further evidence of the

completely open and above board manner in which the Severance Fund was created, administered and finally terminated.

Thereafter Mr. Perkins, the attorney for the trust fund, prepared an agreement entitled "Agreement for Termination of Trust and Distribution of Assets". This agreement [Ex. G] was approved by all of the beneficiaries, the Local through its executive board and the trustees of the Severance Fund. [R. Tr. p. 1844, line 24, to p. 1845, line 24.] Following this, Larry McBride, who managed the investments under the Severance Fund, was engaged to and did make an audit of the condition of the fund and distributed to each of the beneficiaries, including appellants, their proportionate shares. [R. Tr. p. 164, line 23, to p. 165, line 1; p. 168, line 23, to p. 169, line 3.] The two business agents, not members of the executive board, retained their proportionate shares and used such for their own private purposes. They were not indicted.

The remaining beneficiaries, all named defendants in the instance Indictment, desired to continue the fund as a joint investment and therefore established a fund denominated the "Security Fund". [R. Tr. p. 213, line 8, to p. 223, line 23; p. 1977, line 1, to p. 1978, line 6.] Thereafter their proportionate share of the Severance Fund, together with some of their personal funds, were paid into the new security fund, thus making each of their shares equal.

Count II is based upon the expenditure of Union funds ($220.00) for costs and expenses incurred in the dissolution of the Severance Fund. [Clk. Tr. p. 3.] There is no conflict in the evidence that Larry McBride

handled the dissolution and received a Union check for $220.00 [Ex. 2], which included the actual paying out of recording costs and expenses incurred in the legal transfer of the trust deeds which made up a part of the Severance Fund. [R. Tr. p. 164, line 12, to p. 172, line 1.]

Mr. McBride testified that he did "an audit" of the Severance Fund and furnished this audit to the trustees of the fund at a meeting at which all six beneficiaries were present. [R. Tr. p. 191, line 23, to p. 192, line 18.]

The Union check for $220.00 [Ex. 2] had the handwritten words "arbitration audit" appearing in the upper left-hand corner. Mrs. Dorothy M. Johnson, a witness for the prosecution, testified that this phraseology "arbitration audit" on the check might simply have resulted from a "misunderstanding" by her. [R. Tr. p. 993, line 8, to p. 994, line 9.] Mrs. Johnson was the bookkeeper and office manager for the Union from the time of Gladys Rang's death in 1957 to the date of trial. [R. Tr. p. 860, line 16, to p. 861, line 1.] The words "arbitration audit" were in the handwriting of this witness, but she testified she recalled very little about this incident. However, she did testify that she normally but not always got instructions on such matters from Appellant Woxberg. [R. Tr. p. 890, line 14, to p. 891, line 1; p. 992, line 12, to p. 994, line 14.] But neither the check nor any questions by counsel refreshed her memory in any manner whatsoever regarding the notation "arbitration audit" as to who told her to put this on the check, if at all. [R. Tr. p. 992, line 21, to p. 994, line 14.]

3. The Theory of the Court Below.

On appeal to the Circuit Court, appellants contended that Section 501(c), the Landrum-Griffin Act, was applied retrospectively as to Count I and, therefore, appellants were being punished by an *ex post facto* law in violation of Article I, Section 9(3), of the Federal Constitution. Further, appellants contended that the evidence was insufficient to sustain the verdict because the trust, the Severance Fund, was a valid and subsisting trust, a pension plan for the paid employees of the Union, created by the executive board of the Local Union within its authority and in accordance with the constitution and by-laws of the Local Union. Since appellants' point as to the *ex post facto* application of 501(c) was well taken as to Count I, the Circuit Court apparently[3] declined to definitely pass upon this second point. [App. "A", *infra*, pp. 18, 19.]

Based upon this analysis of the evidence that the trust was valid, appellants urged as to Count II, under the authority of *United States v. Carter, supra,* that the Union was obligated to pay for the expenses in connection with the dissolutionment of the Severance Fund The Circuit Court, in rejecting this argument, stated as follows:

> "Appellants argue that the union had 'a continuing duty to see to it that the funds contained

[3] We say "apparently" because the record is not clear. At one point in the opinion, which will be developed more fully *infra*, the Circuit Court states the trust is "valid" [App. "A", *infra*, p. 14], and then later, as stated above in the text, states that it does not reach any decision on this point.

> therein were distributed to the employees as a gross amount.' (Br. p. 65.) This is valid argument to a jury, but not to this court. Reliance is placed on *United States v. Carter*, 1957, 333 U.S. 210, but the facts of that case do not resemble those here present. *To make that case applicable would require us to find that the original creation of the severance fund was lawful, a question which we do not reach because of our determination that the lack of retroactive effect of §501(c) is here controlling as to Count I, and a question decided adversely to appellants by the jury.*" [App. "A", *infra* p. 19, Emphasis ours.]

It was urged in our petition for rehearing, and it is urged here, that the Circuit Court was required as a matter of law to make such a finding and to apply the *Carter* case to the facts under Count II. It is to this point that this petition will be principally directed.

ARGUMENT.

I.

The Circuit Court by Failing to Find on a Material Question of Law and Fact Has so Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

The refusal of an intermediate court to consider a question of law presented for its determination is reviewable on appeal to a higher court, as is also a refusal of an intermediate court to review the facts found in the court below or its refusal to find facts although properly requested to do so. [*Legnard v. Rhoades*, 40 N. E. 964, 156 Ill. 431 (1895); see also *Dorchester v. Dorchester*, 23 N. E. 1043, 121 N. Y. 156 (1890); *Kennedy v. Porter*, 17 N. E. 426, 109 N. Y. 526 (1888).] These principles are so fundamental to our system of judicial review that the question has seldom been raised and, therefore, there is very little authority on the subject. Certainly one needs no authority to urge that it would be contrary to the very nature of due process of law to allow a decision to stand based on only one principle of law and only on part of the evidence in a given case and ignore equally applicable principles of law and especially equally important evidence in the record. It is respectfully submitted that this is what the Circuit Court has done in the instant case, which calls for this Court's exercise of its powers of supervision to insure that a final decision in the case at bar is rendered only after a consideration of all of the evidence and all applicable rules of law.[4]

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[4]That this Court has heretofore on certiorari reviewed decisions of the Circuit Courts when principles of law have been incorrectly applied and the sufficiency of the evidence questioned,

Admittedly, in the instant case, having decided that prosecution under Section 501(c) as to the Severance Fund consistuted an *ex post facto* application in violation of Article I, Section 9(3) of the United States Constitution [App. "A" p. 18], it would not be necessary for the Circuit Court to make a decision as to whether or not the Severance Fund was a valid trust insofar as *Count I* is concerned. However, the question of whether or not the Severance Fund was a valid trust is material to a decision under *Count II* and the court in passing upon the sufficiency of the evidence as to that count must, as a matter of due process of law, reach a decision on this question.

In appellants' opening brief, some twenty-two pages (pp. 36-55) were devoted to analysis of the evidence and citation to authorities to support the position take, by appellants, both at the trial level and on appeal, that the Severance Fund was a valid trust. In urging the insufficiency of the evidence as to Count II, appellants stated in their opening brief at page 65 as follows:

> "*At the outset, we incorporate herein our argument under Count I that the severance fund was a duly established form of compensation for the paid employees of the Union.* The Union, therefore, had a continuing duty to see to it that the funds contained therein were distributed to the employees as a 'gross' amount. Thus when the Union paid Mr. McBride the sum of $220.00 for services rendered by him in making the audit and the distribution of the assets of the sever-

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see *O'Leary v. Brown-Pacific-Maxon*, 340 U. S. 504, 508, 71 S. Ct. 470, 95 L. Ed. 483 (1951); *Great Atlantic and Pacific Tea Co. v. Super-Market Equipment Corp.*, 340 U. S. 147, 71 S. Ct. 127, 95 L. Ed. 162 (1950).

> ance fund it was a lawful and proper Union expenditure under the law, and not embezzlement or theft under Section 501(c).' [Emphasis added.]

This argument was supported by citation to this Court's decision in *United States v. Carter*, 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957).

The gist of the holding in the *Carter* case appears to appellants to be that where the employer has set up a valid and subsisting pension plan for its employees, there is a continuing duty on the part of the employer to see that the moneys that are due the beneficiaries of the plan are paid to them in a gross amount—that is without first deducting expenses and costs incurred in the administration and distribution of the funds. [353 U. S. at p. 220.] Thus it would follow that the payment of $220.00 to McBride in the instant case was a proper union expense and not embezzlement under Section 501(c) *if the Severance Fund was a valid pension plan for the paid employees of the union, i.e., a valid and subsisting trust.* The jury obviously, as indicated by the Circuit Court [App. "A" p. 15], rejected this theory and found that the Severance Fund was not a valid pension plan, not a valid trust,[5] and therefore the expenditure of $220.00 to Mc-

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[5]Obviously they had to find this in order to convict appellants under Count I of embezzlement. This is exactly what the jury was required to decide as to Count I when it was instructed by the District Court as follows:

> "Now, I want to go back and discuss with you for just a moment or two the indictment. Count I concerns the severance fund and a large part of the testimony in this case concerns the severance fund and a large part of the testimony in this case concerns count I, the severance fund. I told you, I think I told you, I may not. You know that memory is tricky and I don't know whether I told you or not.

Bride for services rendered in auditing and dissolving the Severance Fund was not a proper and lawful union expenditure.

I told the l... ers, but I think I told the lawyers in your presence, that one of the issues here to be determined by you is who owned the severance fund. Was the severance fund owned by the union or was it owned by the severance fund itself, by the trust? There is no dispute in this case that the money that went into the severance fund belonged to the union. It was union refunds. We have in evidence the checks and I have the checks before me, and the checks are made payable to Line Drivers Local 224. So when these checks were issued and delivered, they belonged to the union.

"They were deposited in the fund account. Did that deposit in the fund account mean that the money was transferred over to the fund, or did it belong to the union?

"Now, in determining this question, you can go back to Exhibit E, which is the agreement and declaration of trust, and you may determine now from this agreement that there was a transfer of these funds from the union to the trust. The agreement says:

"'The membership by resolution duly adopted voted to make certain contributions to a severance fund to provide a measure of security to certain officers or paid employees.'

"And then Local 224 has directed that insurance refunds payable to it from time to time shall be contributed for the aforesaid purpose, together with such other moneys as may be designated for that purpose in the future.

"Now, here is a question of fact. Here is the agreement. It is for you to determine in your own mind whether or not these funds were transferred to the severance fund. If they were, then you will have to find the defendants not guilty on count I, because the charge is that they stole and converted the money from the union and, of course, if the union didn't have the money, then they can't be guilty of stealing and converting the money." [R. Tr. p. 2778, line 8, to p. 2779, line 22. This instruction was excepted to by appellants, R. Tr. p. 2789, line 19, to p. 2790, line 16; p. 2694, line 9, to p. 2696, line 10.]

The giving of this instruction was urged as error in the court below, both with respect to Count I and Count II, for the jury having decided as to Count I that the trust was invalid must find as to Count II that the payment of the funds to McBride was not a proper and lawful union expenditure, and if made with fraudulent intent, was embezzlement under Section 501(c).

There is, however, not one scintilla of evidence in the record below to support such a conclusion. To the contrary, the evidence indicates without contradiction that the Severance Fund was a valid trust. In the first instance the by-laws of the local union provide:

> "(4) Salary and expenses of all employees shall be set and approved by the secretary-treasurer and the president subject to the approval of the executive board. No action shall be taken by the executive board or the membership meetings of Local No. 224 that in any way effects policy or expenditures of money in the absence of the secretary-treasurer and president." [Ex. 43; R. Tr. p. 1205, line 9, to p. 1206, line 16.]

This provision clearly indicates that appellants, as officers and members of the Executive Board, had full authority to establish a pension plan (wages[6]) for the paid employees of the union.

Second, Exhibit E, the trust agreement, was adopted by a proper resolution of the Executive Board as indicated by the minutes of the Executive Board meetings of March 27, 1959 and April 3, 1955. [Ex. 44.]

Third, the attorney who drafted the trust agreement, after qualifying as an expert in this field, testified that in his opinion the Severance Fund was a valid and subsisting trust. [R. Tr. p. 1818, line 1, to p. 1819, line 2; p. 1829, line 5, to p. 1831, line 17.] No contrary expert witness was called.

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[6]A pension plan regardless of the form it takes—here a trust fund—constitutes wages to the beneficiaries. [*Kennet v. United Mine Workers of America*, 183 F. Supp. 315 at p. 317 (D.C. 1960); *Hooker v. Hoey*, 27 F. Supp. 489 at p. 490 (D.C. N.Y. 1939).]

Finally, throughout the entire existence of the Severence Fund the trustees, through their agent McBride, and not the union, exercised dominion and control over the funds (the indicia of ownership) and the union as such had no control or voice in these matters. [R. Tr. p. 113, line 22, to p. 114, line 8; p. 165, line 2, to p. 167, line 22.] Where, then, is there any evidence in the record that the Severance Fund as a trust was invalid and that title and ownership to the funds deposited therein still belong to the union?

The Circuit Court seemingly answered this question in favor of appellants by stating in its opinion as follows:

> "It seems uncontradicted from the record, and particularly so from a reading of Exhibit E in evidence (the trust agreement) that when funds were deposited irrevocably in the severance fund the union had no voice in the management or use of these funds, except the duty to join in with the beneficiaries if it was desired to dissolve the trust before its normal expiration. *This was a valid trust.* Where a trust is valid, legal title is held by the trustee, and the *cestui que* holds a beneficial interest, or equitable estate. Such a fund is not the property of the union. *Lewis v. Benedict Coal Corp.*, 1960, 361 U.S. 459, 465-466. . . .
>
> "*We agree with appellants, then, that the court in this case was required to find as a matter of law that the title to the union funds, the insurance refund checks, passed to the trustees and the beneficiaries under the trust at the time that each check was endorsed and deposited in the severance fund account.* Therefore the district court should

> have granted appellants' motions for acquittal on Count I. In denying the motions and leaving this question to the jury, the district court allowed the jury to reach a decision inconsistent with the facts and law in this case." [App. "A", pp. 13-14. Emphasis ours.]

The Circuit Court, however, did not rest its decision as to Count I on this basis, but held that the conviction under Count I must be reversed because of the *ex post facto* application of Section 501(c) in violation of Article I, §9(3) of the United States Constitution. [App. "A", pp. 17-18.] Then in passing upon Count II, the Circuit Court declined to pass upon the validity of the Severance Fund. [App. "A", pp. 18-19.]

The question here then is, was this expenditure a proper union expense? If the answer is yes there can obviously be no unlawful conversion under Section 501(c), irrespective of the intent of appellants in authorizing this expenditure. (See *Infra*, pt. III.) The answer to the question is yes if the trust was valid under the authority of the *Carter* case. The answer is no if the trust was not valid, because then the *Carter* case would not be applicable. The Circuit Court avoided these questions by refusing to apply the *Carter* case:

> "To make that case [*Carter*] applicable would require us to find that the original creation of the severance fund was lawful, a question which we do not reach because of our determination that the lack of retroactive effect of § 501(c) is here controlling as to Count I, . . ." [App. "A", p. 19. Bracketed material added.]

This, we submit, constitutes, insofar as Count II is concerned, a failure on the part of the Circuit Court to consider a question of law presented for its determination and to review and determine the facts in light of the question of law presented, which failure by the Circuit Court so far departs from the accepted and usual course of judicial review as to call for an exercise of this Court's supervisory powers.

II.

The Decision Below Is in Conflict With the Decision of This Court in United States v. Carter, 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957).

In *United States v. Carter, supra*, the court was faced with a generally similar situation. This was a civil action by the trustee of a health and welfare fund for employees against a bonding company covering a contractor who had contributed to the fund as required by the collective bargaining agreement. This action was filed under the Miller Act. The Court held these funds were a part of the employees' compensation and justly due them the same as wages paid in cash. More significantly, the Court held that the trustees were entitled to have the bonding company pay liquidating damages, attorneys' fees, court costs and other related expenses of litigation. "If the employees are to be 'paid in full' the 'sums justly due' to them, these items [attorneys fees and expenses] must be included." [353 U. S. at p. 220. Bracketed material added.] Thus, the *Carter* decision holds tht where moneys are placed in trust for the benefit of employees, the trustees of the fund have the right and duty to sue for the benefit of said employees and to recover not only the funds which

are the subject of the suit but for the costs of recovery. It therefore follows that the employees can recover and are entitled to the moneys due them without deducting expenses. This is what happened in the case at bar.

In the payment to Larry McBride for services rendered in auditing and distributing the assets of the Severance Fund, a service to the Union was rendered in providing for the protection of its members in seeing that the funds were properly distributed in accordance with the respective services of each of the beneficiaries. It would certainly seem ironical to require employees to pay the expenses of securing their own wages or compensation. Certainly neither the Landrum-Griffin Act nor any other form of established law intended that individual employees or beneficiaries would have to pay personally for the administration of receiving compensation owed to them. It was a Union duty to see that these recipients received full compensation.

As heretofore stated, the Circuit Court avoids the application of the *Carter* case by refusing to find on a material question of law and fact, that is whether or not the Severance Fund was a valid trust fund. This, as pointed out under Point I, *supra*, is error since as a matter of law the Severance Fund was a valid trust. Therefore, the decision by the Circuit Court under the undisputed evidence in this record is in conflict with the principles laid down by this Court in *United States v. Carter*, which conflict can only be settled by this Court granting the within petition.

III.

The Questions Are Substantial and Important.

This Court has not heretofore had occasion to interpret the scope and meaning of the criminal responsibility of union officials in the management and handling of union funds as set out in Section 501(c) of the Landrum-Griffin Act. The size of the labor movement in this country, the large numbers and segments of our population and economy which it reaches and affects, and more significantly the immense amounts of moneys and properties which have come under the control of its officers and managing officials certainly called for the enactment by Congress of this legislation designed to control union officials by placing them in a position of trust—under fiduciary obligations in the management and handling of union funds and properties. [See 29 U. S. C. §501(a).] In passing upon such legislation, however, Congress could not invision every instance under which a union official could overreach the bounds of his trust to the extent that he could be held criminally responsible under Section 501 (c). This responsibility has obviously been left to our federal courts, which is implicit in the broad language used by Congress in defining criminal responsibility of union officials in this Act. The instant case furnishes this Court with such an occasion, of which advantage should be taken.

Section 501(c) broadly defines the crimes of theft and embezzlement; applies such crimes to the appropriation of union funds and provides for punishment of such activity. It does not attempt to tell us what constitutes embezzlement or unlawful conversion of union funds. For example, in the instant case it was

urged below, and will be urged here if this petition is granted, that irrespective of the application of *United States v. Carter, supra,* the Union authorized the payment of $220.00 to McBride by a resolution adopted by the executive board under the authority granted to it by the by-laws of the local Union—in other words, that the Union consented to the payment of these funds. Is absence of consent an element of the crime of embezzlement or unlawful conversion under Section 501 (c) of the Landrum-Griffin Act? This question has obviously been left for the courts to determine under established and applicable principles of criminal law. [See *Morisseta v. United States,* 342 U. S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952).]

It is fundamental to common law criminal responsibility that the taking, the appropriation, the conversion, to be unlawful, must be without right, without the owner's consent. [Clark and Marshall, Crimes, pp. 741, 759.] This principal must equally apply to conversions under Section 501(c) by analogy to decisions under Title 18, United States Code, Section 656, involving unlawful conversions of bank moneys and properties. Under this statute, which is very similar in language to Section 501(c) of the Landrum-Griffin Act, it has been held that a misapplication or misappropriation of funds which would otherwise be criminal, is not an unlawful conversion when done with the consent of the board of directors of the bank. [See *United States v. Youtsey,* 91 Fed. 864, at p. 869, 870 (C. C. Ky., 1898), reversed on other grounds, 97 Fed. 937; *United States v. Breeser,* 131 Fed. 915 at p. 925 (D. C. N. C., 1904), reversed on other grounds, 143 Fed. 250.]

Although Congress seemed to be more concerned with the civil aspects of the fiduciary obligations imposed upon union officials rather than criminal responsibility and punishment, there is some evidence from an examination of the legislative history and secondary authority that Congress did not intend to eliminate lack of consent as an essential element of the government's proof under Section 501(c).

In a symposium[7] on the legislative history and meaning of the Landrum-Griffin Act, we find the following brief discussion of the scope and effect of Section 501(c), which we submit, has particular application to this facet of the case at bar.

> "It will be noted that while sections 501(a) and (b) dealt primarily with persons who were affiliated with labor unions in a position of some authority or in some representative capacity, section 501(c) is much broader in scope. Embraced in its scope are not only officers of unions but also any person who is 'directly or indirectly' employed by the union. Of course, the crime created refers only to stealing from the person's own union. The section does not make a crime the stealing or conversion of moneys belonging to a union of which the person is not an officer or employee.
>
> "An officer or employee who embezzles or steals from his union, or converts to his own use union funds, is not only subject to prosecution, but also commits a crime if he does these acts for the use of another. Thus the unlawful siphoning of un-

[7]Because the statute is so new, with little case authority interpreting it, we shall call the Court's attention to secondary authority only as an aid to the Court in interpreting the scope and meaning of this new Act.

ion funds by union officials or employees into the pockets of third persons is prohibited.

"What is the status of 'payroll padding' in unions under section 501(c)? The investigators of the Select Committee on Improper Activities in the Labor or Management Field (McClellan Committee) revealed a practice in some unions of putting persons on the payroll of the union who had difficulty in explaining to the Committee what their duties were and whether any such duties had ever been carried out by them. In view of the provisions of section 504(a) limiting the eligibility for union office of persons with criminal records it may be anticipated that such individuals will find a haven in non-prohibited clerical or custodial positions.

"Is there a violation of this section if it can be proven that actually such employees have been engaged in order to give them a sinecure; or, if they do work, they are engaged at grossly high pay in the light of the duties which they fulfill? Is this stealing, embezzlement or unlawful and willful abstraction or conversion of union funds? *The statutory language deals with a situation wherein moneys are taken when there is no authority to do so.* Therefore, the mulcting of unions through the establishment of sinecures does not seem to fall within the scope of the criminal provisions of the statute, inasmuch as the employment of such persons is an authorized one." [Symposium on the Labor-Management Reporting and Disclosure Act of 1959, pp. 526-527. Tulane University, 1961. Emphasis added.]

Thus, even if we assume and admit that the payment of $220.00 here constituted an unfair compensation to the paid employees of the union, something to which they were not as a matter of law entitled to, nevertheless in the opinion of the writer of that article, this would not constitute embezzlement or unlawful conversion under Section 501(c).

His conclusion that *"The Statutory language deals with a situation wherein moneys taken where there is no authority to do so"* is a logical analysis in light of the common law requirement that an unlawful conversion occurs only when property is taken without right, without consent. Thus, whereas here, the by-laws of the Local Union authorize the fixing of salaries by the officers with approval of the executive board, such officers cannot be prosecuted for embezzlement or unlawful conversion, even if it be assumed they overreached the bonds of discretion with which they were clothed. Such action might well subject them to just criticism, but not prosecution for criminal conduct.

This view, that authorized expenditures under the local charter, by-laws, constitution or resolution of the Union are not a basis for either civil or criminal prosecution, is also shared by Dean Frank J. Duncan, Dean of the Graduate School of Law, Georgetown Law Center, an authority on labor law matters. In an article in a symposium conducted by Georgetown Law School and published in the Georgetown Law Journal, Dean Duncan had this to say concerning authorized expenditures under Section 501:

> "In another vein, the problem of the propriety of expense accounts under section 501 worries the union official. Traditionally in many unions, of-

ficers are granted a daily expense allowance which may be allotted irrespective of whether the union official actually expends these sums for daily expenses. It is also customary in many unions to grant to union officials a weekly or monthly car expense allowance. The question arises as to whether, if the union official does not actually spend the amount allotted for these purposes, said union officer is breaching his fiduciary duty to the members. A similar problem arises when a union car is driven for personal use. Strictly speaking, when a fiduciary expends money for non-union purposes he is liable to account, but this does not answer the question. It is no trade secret that as standard practice corporate officers, who are also fiduciaries, use company expense accounts and company automobiles and airplanes, and sometimes in a rather lavish manner. *If these expenses are authorized by the company charter, by-laws or resolution, no particular problem arises. Such expenses are, in effect, an increased emolument of office, added salary if you will, and so long as this is understood by all parties concerned, no question as to their propriety will arise. In the case of unions, such expenditures would seem to be legal and proper so long as it is clear that authority can be found for such expenditures in the union constitution, bylaws or legitimate resolutions of the governing body and it is so understood by the union membership.*" [48 Georgetown L.J., p. 296, 1959. Emphasis added.]

Whether we are talking about expense accounts or whether we are talking about pension or severance plans and the payment of the expenses incurred in the

administration of such plans, since they are both considered compensation for services rendered or to be rendered, where they are authorized by the Governing rules of the local union there can be no unlawful conversion or embezzlement, since the appropriation was with right, with consent of the owner.

From the uncontradicted evidence in the case at bar, appellants with the approval of the executive board had full authority to fix the salary and wages of the union officers and other paid employees. They exercised this function under the authority granted them by the by-laws of the Local Union in creating the Severance Fund and in paying out the expenses incurred in connection with the administration and dissolution of this fund.[8]

The only shred of evidence upon which the government and the courts below have relied upon to establish an unlawful conversion in this instance is the appearance of the words "arbitration audit" on Exhibit 2. We recognize that it could be argued, and it has been adopted by the decisions of the courts below, that these words imply the necessary fraudulent intent when viewed as an attempt to cover up the true nature of this expenditure and thereby vitiate the Union's consent to the same. However, it is respectfully submitted that before such an interpretation can be placed on this language and such an inference drawn, there must be some evidence to show that these words were placed on Exhibit 2 by appellants or under their direction.

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[8]It is interesting to note that in addition to the $220.00 paid McBride, Attorney Perkins was paid by the Union for his services in drafting the agreement to dissolve the trust fund, Exhibit G. [R. Tr. p. 1851, line 22, to p. 1854, line 10.] Appellants were not prosecuted for this expenditure even though factually it cannot be distinguished from the payment to McBride.

As indicated in our summary of facts, there was no such evidence. The words were placed on the check by Dorothy Johnson, the Union bookkeeper, and she testified that she had no independent recollection of how or where the word "arbitration" came from, that it might just as well have been a mistake or misunderstanding on her part. [R. Tr. p. 992, line 12, to p. 994, line 14.] Furthermore, the evidence discloses that McBride did make an *audit* of the Severance Fund and furnished this audit to the trustees of the fund at a meeting at which all six beneficiaries were present. [R. Tr. p. 191, line 23, to p. 192, line 18.] Thus it follows that the word "arbitration" was a mistake of the bookkeeper as she so testified and not placed on the check, Exhibit 2, under the direction of either appellant.

This Court has held that where a state conviction is based upon palpably insufficient evidence, such conviction is a denial of due process of law in violation of the Fourteenth Amendment. [*See, Thompson v. Louisville*, 362 U. S. 199, 8 S. Ct. 624, 4 L. Ed. 654 (1960); *Gardner v. Louisiana*, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961).] Therefore, it should follow that a federal conviction based upon insufficient evidence is likewise a denial of due process under the Fifth Amendment. Certainly such evidence as relied on here to support this conviction is not sufficient to overcome the presumption of innocence. We draw this Court's attention to the fact that appellants were members of the Teamsters Union, which union and some of its officials have come under strong criticism from the public through widespread publicity. It is obvious that the government and the jury concluded that appellants took unfair advantage of their authority to fix salaries in creating the Severance Fund and in authorizing the pay-

ment of $220.00 to McBride for expenses incurred in connection with the dissolution of the fund. Such conduct may or may not, however, constitute a breach of faith and a violation of their fiduciary duties established under Section 501(a) of the Landrum-Griffin Act. This may or may not give rise to a civil action by the Union or the members of the Union in absence of Union action (Section 501(b)) to recover these moneys on a basis of a breach of fiduciary duty.

The District Court and the jury, however, through lack of adequate and proper instructions on this matter, lost sight of the fact that not every breach of a fiduciary duty under Section 501(a) constitutes criminal conversion under 501(c). It could even be argued here that in a civil action appellants would not be held guilty of a breach of trust, since the expenditures were within the authority conferred upon them by the by-laws of the Local Union. Such a civil action by members of the Union or by the Union itself under Sections 501(a) and (b) of the Landrum-Griffin Act would be comparable to actions by stockholders or the corporation against members of the board of directors or its officers who have excessively compensated themselves for services rendered. [See *Winkleman v. General Motors Corp.*, 39 F. Supp. 826 (S.D. N. Y. 1940).] In such civil actions, the question to be determined is the reasonableness of the compensation as fixed. This is a lot different, however, from the requirement in criminal prosecutions for conversion and embezzlement, to show that the same was done with fraudulent intent and without the consent and permission of the owner.

Conclusion.

Since the evidence is palpably insufficient to show either the existence of fraudulent intent on the part of appellants or to negate consent by the Union to the payment of the $220.00 to McBride, appellants' convictions under Count II should have been set aside.

More significantly—the decision below is in error for its failure to find in considering Count II that the severance fund was a valid and subsisting trust—a decision which on this record must be reached as a matter of law. For if the severance fund was a valid trust the payment to McBride was, under the principal of the *Carter* case *supra*, a proper Union expenditure.

The failure of the Circuit Court to find on this material question of law and fact presented for its consideration so far departs from the accepted and usual course of judicial review as to call for a plenary examination by the highest judicial level.

Wherefore, a writ of certiorari to the Court of Appeals for the Ninth Circuit should be issued to the end that the judgment in the instant case may be reviewed by this Court.

Respectfully submitted.

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Attorney for Appellant Woxberg.

GRANT B. COOPER,
Attorney for Appellant Dykes.

APPENDIX "A".

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Homer L. Woxberg, Sr., and Wayne Franklin Dykes, Appellants, vs. United States of America, Appellee. No. 18,805.

[March 12, 1964]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes, Merrill and Koelsch, Circuit Judges

Barnes, Circuit Judge:

Appellant Woxberg appeals his convictions on four counts of embezzlement and conversion of union funds, charged to be in violation of Section 501(c) of the Labor-Management Reporting & Disclosure Act of 1959 (Counts I, II, IX and X). Appellant Dykes appeals from his conviction on two counts (I and II).

Count I relates to the dissolution of a previously existing trust fund (sometimes known as a "severanc fund") established by the executive board of a local union as a pension plan for its paid employees, amounting when it was dissolved to $35,178. Count II refers to a $220 payment made by the union for costs and expenses in the termination of said severance fund, including recordation fees and cost of an audit. Counts IX and X refer to $460.86 paid by the union for repairs to a Jeep automobile owned by Woxberg.

There were sixteen other counts on which one or more defendants were tried, but neither the other defend-

ants, nor the other counts of which these defendants were acquitted, are here involved.

The union (Line Drivers Local 224 of the International Teamsters Union) came into existence in 1943 as a trusteeship, set up and controlled by the International Teamsters Union. In 1947 it operated as a local union, without trusteeship, under certain rules and regulations duly adopted. It elected a governing body of seven to an executive board. Four members of this board were the elected officers. Defendant Woxberg was the secretary-treasurer of the union (the highest officer locally); Dykes was president. This was a board with apparent autocratic power, but it apparently was what the union members wanted or, at least, settled for.

On February 28, 1954, the executive board adopted a resolution, calling for the creation of a pension fund for the paid officers and employees of the union, which included appellants.

The rules and regulations of the local did not require that minutes and resolutions of the executive board be brought to the attention of the entire membership, but such a procedure was regularly followed.

A motion to approve the creation of the pension fund was made at a general meeting; the motion was tabled until the next meeting. We quote what followed from appellants' brief:

> "The minutes of the general membership meeting of February 28, 1954 reflect that appellant Woxberg explained in detail the purpose of the proposed pension plan for the officers and employees of the Local Union. In particular it was

pointed out that the moneys placed in the pension fund would be in lieu of increase in wages for the paid union employees for the next ten years, except for inflationary periods. At the next general membership meeting on March 28, 1954, a motion was made, seconded and carried to table the pension plan for the paid employees indefinitely.

Immediately thereafter, the officers of the Union began negotiations with the employers for the purpose of established a pension plan for the regular members of the Union, which pension plan was ultimately obtained. On March 27, 1955, while these negotiations for a pension plan for the rank and file were still in progress, the executive board, at its regular meeting of that date, passed the following resolution:

> 'After some discussion involving pensions and severance pay for the officers and office manager, a motion was made and seconded to concur in the request of the secretary authorizing him to have an attorney draft the trust agreement covering severance pay for the paid officers and office manager and deposit the insurance refunds in the severance trust. Motion carried.'

At the general membership meeting of the same day, the minutes of the executive board meeting of that morning were read and approved.

Prior to the executive board meeting of March 27th, appellant Woxberg as secretary-treasurer of the Union, had conferred with Richard Perkins, a lawyer, who was then a member of the firm of

Bouchard and Perkins, as to whether or not such a fund could be established in accordance with the rules and regulations of Local No. 224. Mr. Perkins advised appellant Woxberg that such a fund could be legally established. Mr. Perkins then prepared the following 'Agreement and Declaration of Trust, Severance Fund Line Drivers Local 224.' This Trust Agreement, Exhibit 61, and E, consisted of 8 pages and provided in part as follows:

'1. *Purpose of Trust:*

(a) The membership of Line Drivers Local No. 224, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter referred to as "Local 224," an unincorporated association, has by resolution duly adopted voted to make contributions to a severence fund to provide a measure of security for certain paid officers and employees of Local 224 and provide benefits for them similar to some of the benefits available to employees of numerous private employers under pension, retirement, profit-sharing, and stock bonus plans;

(b) Local 224 has directed that insurance refunds payable to it from time to time shall be contributed for the aforesaid purpose, together with such other monies as may be designated for that purpose in the future; and

(c) It is desired to establish definite and orderly procedures through the device of a trusteeship to carry out the aforesaid purpose.'

In addition thereto, there were the usual provisions covering such a trust including a designation

of the requirements for becoming a beneficiary under the trust. On April 1, 1955, the Trust Agreement was signed and approved by all of the then beneficiaries, defendants Hester and Barnes, the office manager, Gladys Rang and appellants Woxberg and Dykes. The latter three signed in capacity as trustees.

On April 3, 1955, at a special meeting of the executive board, the following motion was made and carried: 'The secretary read the Severance Fund Trust Agreement. The motion was made and seconded the Severance Fund Trust Agreement be approved effective April 1. Motion Carried.' While there was a special general membership meeting on April 3, 1955, the only matters that were discussed there concerned an anticipated strike.

At the next regular general membership meeting, April 24, 1955, the minutes of the executive board and general membership meeting of March 27, 1955 were read and approved, and the minutes of the special executive board meeting of April 3, 1955 concerning the reference to the severance fund trust agreement was read and approved. No reference was made of any of these matters under the heading of new business.

The resolution adopted by the executive board on March 27, 1955, not only authorized the drafting of the Trust Agreement, but also authorized the deposit of insurance refund checks in the trust fund account [Exhibit 44.] Paragraph 1(a) of the Trust Agreement [Exhibit E], prepared pursuant to this authority, provided that the funds

necessary to establish the trust were to come from certain insurance refund checks belonging to Local 224. The insurance refunds, ultimately deposited in the severance fund account, were annual rebates or refunds on the insurance premium paid by the Local Union through the Western Conference of Teamsters for a group life insurance policy. This policy covered each member of the rank and file of Local 224, as well as the rank and file members of the other local unions making up the Western Conference of Teamsters. The amount of the refund checks varies from year to year since they were based upon the experience of the entire group policy for each preceding year. Because the original insurance premiums were paid from dues collected from the rank and file members, there was never any question that the insurance refund checks originally were the property of Local 224.

Beginning in 1955, the refund checks were deposited in an account at the California Bank under the name of 'Severance Fund Line Drivers Union No. 224.' [Exhibit 1.] The refund checks deposited in the severance fund account were as follows:

(1) Exhibit 29. Check dated March 1, 1955 in amount of $8,143.43 payable to Line Drivers Local No. 224;

(2) Exhibit 30. Check dated February 23, 1956 in the amount of $7,838.02 made payable to Line Drivers Local No. 224;

(3) Exhibit 31. Check dated March 7, 1957, in the amount of $8,149.40 payable to Line Drivers Local No. 224;

(4) Exhibit 32. Check dated February 4, 1958, in the amount of $6,707.48 payable to Line Drivers Local No. 224.

In each instance the refund check was endorsed for deposit in the 'Severance Fund, Line Drivers Union Local 224', and went directly into the severance fund account without passing through the regular Union account.

On February 23, 1958, the executive board, having received a better offer from another insurance company which would effectuate a savings to the Local Union on insurance premiums for the same coverage, voted to change the company under which the rank and file group insurance policy was held. As a result there were no further refund checks paid to the Local Union. Thereafter the severance fund continued with the funds already on deposit and no further moneys of the Union were transferred to this account.

The funds were invested almost entirely in second trust deeds and were supervised by one Larry McBride, a man thoroughly familiar with such investments. No question was raised at the trial that the severance fund was ever maintained in other than a proper manner, or that investments were improperly made. As a result, the severance fund prospered. At the time it was ultimately dissolved on November 2, 1959, and the cash and trust deeds distributed among the then beneficiaries, the fund was worth approximately $35,000.00. It is on this amount that the government based the allegations of embezzlement under Count I. This, however, did not include the $5,958.00 distributed

to the estate of Gladys Rang, upon her death [in 1957], which was done in accordance with the terms of the trust agreement. The same formula for determining each beneficiary's interest in the severance fund when dissolved in November, 1959, was also used in determining Gladys Rang's share in the fund at the time of her death."

The Landrum-Griffin Act of 1959 became effective on September 14, 1959. On September 27, 1959, the executive board, at the specific instance and request of appellant Woxberg who had conferred with union lawyers concerning the Landrum-Griffin Act and its ramifications, adopted the following resolution:

"Motion made and seconded that the Secretary-Treasurer be authorized in conjunction with the attorneys to discontinue payments to the Severance and Pension Plan Funds and car allowances to the paid employees and to distribute these monies to the employees as salary, thereby placing the responsibility of reporting to the government on the employee involved. Motion carried."

It was explained to the general membership by appellant Woxberg that because of the requirements of the Landrum-Griffin Act (calling for the union to report all its expenditures and other financial transactions periodically and in detail), it would be simplier to lump together as salary the car allowances and other fringe benefits, thus placing the responsibility upon the individual employees to report to the government as income these receipts on their income tax returns.

The executive board was advised by appellant Woxberg that this fund could be carried on as a private fund

thereby relieving the union of the necessity of making such a report to the government under the Landrum-Griffin Act.

The general membership meeting adopted, on September 27, 1959, an almost similar motion to that quoted above, but referring to "pension plan" rather than "Severance and Pension Plan Funds."[1]

Thereafter Mr. Perkins, the attorney for the trust fund, prepared an agreement entitled "Agreement for Termination of Trust and Distribution of Assets." This agreement was approved by all of the beneficiaries, the local through its executive board, and the trustees of the severance fund. Following this, Larry McBride, who managed the investments under the severance fund, was engaged to and did make an audit of the condition of the fund and distributed to each of the beneficiaries, including appellants, their proportionate shares.

The remaining beneficiaries, all named defendants in this indictment, desired to continue the fund as a joint investment and therefore established a fund denominated the "Security Fund." Thereafter their proportionate share of the severance fund, together with some of their personal funds, were paid into the new security fund, thus making each of their shares equal. The security fund is still intact at this time.

[1]The exact language of that resolution was:

"Motion was made and seconded that the Secretary-Treasurer be authorized in conjunction with the attorneys to discontinue payment to the pension plan and car allowance to paid employees and distribute these monies to the employees as salary, thereby placing the responsibility of the reporting to the government on the employee involved. Motion carried." (Ex. 44.) Compare with the motion adopted by the executive board.

The two primary questions there presented were:

(1) Whether the Landrum-Griffin Act was applicable. If the alleged conversion ocurred before its passage (*i.e.*, when the funds were *deposited* in the severance fund), then was the prosecution of defendants barred by Article I, § 9(3) of the United States Constitution as *ex post facto* legislation. This question of when the alleged unlawful conversion occurred, say appellants, was a question of law, to be determined by the trial court. The court left it to the jury, as a question of fact, instructing the jury as appears in the margin.[2]

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[2]"Now, I want to go back and discuss with you for just a moment or two the indictment. Count I concerns the severance fund and a large part of the testimony in this case concerns the severance fund and a large part of the testimony in this case concerns count I, the severance fund. I told you, I think I told you, I may not. You know that memory is tricky and I don't know whether I told you or not. I told the lawyers, but I think I told the lawyers in your presence, that one of the issues here to be determined by you is who owned the severance fund. Was the severance fund owned by the union or was it owned by the severance fund itself, by the trust? There is no dispute in this case that the money that went into the severance fund belonged to the union. It was union refunds. We have in evidence the checks and I have the checks before me, and the checks are made payable to Line Drivers Local 224. So when these checks were issued and delivered, they belonged to the union.

"They were deposited in the fund account. Did that deposit in the fund account mean that the money was transferred over to the fund, or did it belong to the union?

"Now, in determining this question, you can go back to Exhibit E, which is the agreement and declaration of trust, and you may determine how from this agreement that there was a transfer of these funds from the union to the trust. The agreement says:

> 'The membership by resolution duly adopted voted to make certain contributions to a severance fund to provide a measure of security to certain officers or paid employees.'

"And then Local 224 has directed that 'insurance refunds payable to it from time to time shall be contributed for the aforesaid

(2) Whether the payment of the union funds to the severance fund was *with the consent* of the union as wages, and therefore not unlawful as a matter of law.[3]

The third error charged (allegedly applicable to all counts) was that there was no proof of fraudulent intent on the part of the defendants; and the fourth—the refusal of the trial court to give Defendants' Proposed Instruction No. 38 (relating to "evidence susceptible of two interpretations").

COUNT I

Did the conversion, if unlawful, and if violative of § 501(c), occur when the four refund checks were endorsed and deposited in the trust account, or when the trust fund was dissolved and the funds withdrawn and turned into the new security fund?

Count I alleges the conversion date was November 2, 1959, when the severance fund was dissolved. Appellants, denying any conversion, allege that if there was conversion, it occurred when the insurance refund checks were deposited in the severance fund. The trial judge

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purpose, together with such other moneys as may be designated for that purpose in the future.

"Now, here is a question of fact. Here is the agreement. It is for you to determine in your own mind whether or not these funds were transferred to the severance funds. If they were, then you will have to find the defendants not guilty on count I, because the charge is that they stole and converted the money from the union and, of course, if the union didn't have the money, then they can't be guilty of stealing and converting the money." (R. Tr. pp. 2778-2779.)

We note that similarly error is charged in the refusal to give Defendants' Proposed Instruction No. 34 (Tr. p. 172), which makes the interpretation a matter of law.

[3]We note that similarly error is charged in the refusal to give Defendants' Proposed Instruction No. 47 (Tr. p. 181).

In view of our conclusion as to Count I, we need not pass specifically on this instruction.

recognized this issue was dispositive of Count I and instructed the jury this was an issue of fact for their determination.

Congress, in enacting this law (§ 501(c)), created a federal crime. The terms used in the legislation retain their common law meaning. (*United States v. Turley*, 1957, 352 U. S. 407, holding that the word "stolen" covers all felonious taking of property, whether obtained by "larceny" or "embezzlement," or "false pretenses.")

> "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with consent of the owner, while in larceny the felonious intent must have existed at the time of the taking." *Moore v. United States*, 1895, 160 U. S. 268, 269-270.

As counsel for appellants state:

> "Applying these principles to the undisputed facts in the case at bar, one may at first blush reach what appears to be either of two reasonable conclusions (1) The original taking, the creation of the severance fund and the deposit of the insurance refund checks in the severance fund account was wrongful because at that instant the defendants fraudulently intended to deprive the union of these funds (embezzlement or larceny), or (2) the severance fund was in its inception legally and properly created by appellants and the insurance refund checks properly and legally transferred to

the trustee under the severance fund by deposit in the severance fund account, but *without the passage of title from the union to the trustees.* Later, after passage of the Landrum-Griffin Act, appellants formed a fraudulent intent to embezzle these funds and then dissolved the severance fund and distributed the proportionate shares to the beneficiaries of the trust (embezzlement only).

The first conclusion we concede is reasonable and the second we contend is unreasonable and not supported by the evidence or the law.

* * *

If the government contends that the criminal conduct here was larceny rather than embezzlement, then it must follow as a matter of law that the unlawful conversion occurred when title to the insurance refund checks was transferred to the severance fund as each check was endorsed and deposited in the severance fund account. Thus, even assuming that the original taking was without right, and with fraudulent intent, appellants could not be prosecuted for violating Section 501(c) because this statute was not law at the time these conversions occurred, that is, between 1955 and 1958." (Emphasis by appellants.)

It seems uncontradicted from the record, and particularly so from a reading of Exhibit E in evidence (the trust agreement) that when funds were deposited irrevocably in the severance fund the union had no voice in the management or use of these funds, except the duty to join in with the beneficiaries if it was desired to dissolve the trust before its normal expiration. This

was a valid trust. Where a trust is valid, legal title is held by the trustee, and the *cestui que* holds a beneficial interest, or equitable estate. Such a fund is not the property of the union. *Lewis v. Benedict Coal Corp.*, 1960, 361 U.S. 459, 465-466.

By the terms of the trust, both the defendants appealing qualified as beneficiaries *prior* to the enactment of the Landrum-Griffin Act.

We agree with appellants, then, that the court in this case was required to find as a matter of law that the title to the union funds, the insurance refund checks, passed to the trustees and the beneficiaries under the trust at the time that each check was endorsed and deposited in the severance fund account. Therefore the district court should have granted appellants' motions for acquittal on Count I. In denying the motions and leaving this question to the jury, the district court allowed the jury to reach a decision inconsistent with the facts and law in this case.

But the district court not only did not so instruct the jury as a matter of law that title passed to the trustees of the trust, it refused to give Defendants' Proposed Instruction No. 34, which raised the factual issue as to whether the funds were or were not "union funds" after delivery to the trust. Exhibit 3 showed that the trustee of the fund had full control over the funds. The only evidence as to the intent of the trustee showed they acted upon legal advice of Mr. Perkins, who testified that, in his opinion, title to the insurance refund checks belonged in the trustee and not in the union. No counter-expert testimony was offered, and no evidence generally to show any belief in any

member of the union that it had title or claim to the trust funds. Each of the defendants (including two nonindicted beneficiaries of the fund) testified that they believed the money in the trust fund was lawfully theirs.

In support of the prosecution's case, it is urged:

> "The minutes of the general membership meeting of Local 224 on February 23, 1958 reveal that in discussing the cost of the group insurance *the membership was unaware* that Experience Rating Refunds were being received annually." (Emphasis added.)

No reference to transcript pages to support such a statement is made in appellee's brief. Such a characterization stems more from an advocate's zeal than from an accurate factual analysis of the minutes. The minutes of the general membership meeting read:

> "The Executive Board minutes were read and approved. The portion of the Executive Board minutes pertaining to change of insurance was laid over to *New Business*. . . .
>
> "*New Business.*' In the discussion of changing insurance companies, a motion was made and seconded to change insurance companies and also to check into increasing the death benefit with the balance of the 34c without increasing the dues. Motion carried." (Exhibit 44, meeting of February 23, 1958, pp. 1, 2.)

How this demonstrates that the membership "was unaware that Experience Rating Refunds were being received annually," we cannot understand. Of course,

the executive board had, by the rules and regulations adopted by the union, and approved by its membership, given the executive board near absolute power to conduct the union's affairs.[4] On April 3, 1955, the executive board had approved the severance trust agreement. Perkins prepared the dissolution of the trust agreement, and his bill was paid by the union.

A month after the deposition of insurance refunds in the severance trust fund stopped, and for nineteen months thereafter, defendants Dykes, Hester and Barnes each received monthly a $500 Government Bond purchased by Local 224. No charge is made in this case that such payments were illegal. They do indicate some recognition by those governing the local that some officers benefiting from the severance fund were to be rewarded for their services in another way, if insurance refund payments to the severance fund were to be determined.

There is other evidence which raises doubt as to whether the general membership were not as familiar with the severance fund as they were with any other

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[4]Local 224 Rules, adopted November 23, 1947, provided in part as follows:

"* * *

(2) The administration, supervision and direction of the affairs of Local No. 224 shall be vested in the Secretary-Treasurer and the President, subject to the approval of the Executive Board.

(3) All employees of Local No. 224 shall be employed and directed by the Secretary-Treasurer and President.

(4) Salary and expenses of all employees shall be set and approved by the Secretary-Treasurer and the President, subject to the approval of the Executive Board. No action shall be taken by the Executive Board or the membership meeting of Local No. 224 that in any way effects policy or expenditure of money in the absence of the Secretary Treasurer and President. * * *" (Ex. 43.)

aspect of the local union's finances and operation. Concededly this "information" may not have been complete, but under the organizational framework chosen by the membership this was the way they apparently wanted their union affairs run.

Appellee refers more than once in its brief to the alleged fact that "the members were unaware" of the annual insurance refunds (p. 21); that "during the entire period in which the severance fund was in existence no mention was made of it to the rank and file members of Local 224" (p. 25); that "not only the creation of the Severance Fund was concealed, but even its existence and later distribution was concealed . . . from the rank and file members of the Executive Board and the general membership as well." (P. 36.)

If we assume this to be true, it may establish sufficient evidence from which a jury might conclude that there was an unlawful taking of funds from the union to deposit in the trust (a matter we do not herein decide), but it also emphasizes the fact the taking was at the time when the insurance refunds were deposited, not when the severance fund was distributed. If this was embezzlement, then it was the taking of money which had lawfully come into the hands of the holder, and the original insurance refunds must have lawfully come into the defendants' hands. If the fund was unlawfully created, then it was not embezzlement but theft or larceny, and the taking occurred either when the original severance fund was set up, and the first deposit made, or perhaps, as each subsequent deposit was made in the fund.

Either the creation of the severance fund and the subsequent deposits therein were done with the approval

of the general membership (or, at least, with the approval of the executive board authorized to act for the general membership), or without any such approval. If approval was had of additional wages, they were lawfully paid. If approval was not had by either the general membership or the executive board, as appellee urges, then the taking was unlawful. This taking was done between 1954 and 1957, and prior to the passage of the Landrum-Griffin Act, effective September 14, 1959. The Act could not make a federal crime out of acts of a defendant which prior to that time had not been federal crimes, but acts punishable under state law. To make the acts retroactively criminal would have constituted an *ex post facto* application of § 501(c), and would be violative of Article I, § 9(3) of the United States Constitution.

The judgment of conviction of each defendant as to Count I is reversed, and the Count dismissed.

COUNT II

Appellants urge there was no fraudulent intent as to the convicted defendants with respect to Count II—the payment of $220 to Larry McBride for services rendered by him to the severance fund in dissolving it, and not to the union. The expenditure by the union, allegedly arranged for by appellants, of the $220 saved for the benefit of the severance fund (Gov.'s Ex. 2) occurring on December 2, 1959, if it was a violation of the Landrum-Griffin Act, occurred *after* its passage on September 14, 1959.

Whether the union approved of this payment, or whether it was obtained with fraudulent intent by marking the check "arbitration audit" and entering the

charge on the union expense sheets in this inaccurate manner presented a question of fact that the jury decided adversely to appellants.

Appellants argue that the union had "a continuing duty to see to it that the funds contained therein were distributed to the employees as a gross amount." (Br. p. 65.) This is valid argument to a jury, but not to this court. Reliance is placed on *United States v. Carter*, 1957, 353 U.S. 210, but the facts of that case do not resemble those here present. To make that case applicable would require us to find that the original creation of the severance fund was lawful, a question which we do not reach because of our determination that the lack of retroactive effect of § 501(c) is here controlling as to Count I, and a question decided adversely to appellants by the jury.

Nor is the error preserved to appellants by the trial court's failure to give Defendants' Proposed Instruction No. 38.[5] (Clk's Tr. p. 175.) This claim is based upon appellants' contention that "[E]ven assuming that there is some shred of evidence on which a fraudulent intent could be inferred, the jury could not ignore, nor can this court ignore, the overwhelming evidence that in this case the transfer of the union funds was done under a *bona fide* claim of right, and was completely open and above-board." (Brief, p. 57, emphasis by appellants.) While such a claim might well be urged as to Count I, the same evidence does not exist as to Count II. Looking at the evidence as we must, in a manner most favorable to the prosecution, *Glasser v. United States*, 1942, 315 U.S. 60, we cannot hold there

[5]Defendants' Proposed Instruction No. 38 is CALJIC form No. 26.

was no jury question, as a matter of law, on the record before us.

Appellants' attack upon the refused jury instructions (and particularly No. 38) is based upon an old line of cases that held that in "a criminal case based upon circumstantial evidence, in order for the motions [for aquittal] to be denied, guilt must be the only reasonable hypothesis from such evidence"—or that it is necessary (to convict) "that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt," citing cases (Brief, pp. 58, 59).

As we recently pointed out in *Byrnes v. United States*, ... F. 2d .... (decided February 7, 1964, No. 18752, n. 5a):

> "5a. Appellant urges us to accept his argument that in order to convict, inferences that may be drawn from circumstantial evidence must not only be consistent with a defendant's guilt, but inconsistent with every reasonable hypothesis of innocence (Opening Brief, pages 23-25), or, as it is sometimes phrased 'irreconcilable with any other rational conclusion.' This is the old rule which the Supreme Court disapproved in *Holland v. United States*, 1954, 348 U.S. 121, 139-140. *Cf. Strangway v. United States*, 9 Cir. 1963, 312 F.2d 283, 285; *cert. denied* 373 U.S. 903; *Bolen v. United States*, 9 Cir. 1962, 303 F.2d 870, 874; *Cape v. United States*, 9 Cir. 1960, 283 F.2d 430, 433; *Remmer v. United States*, 9 Cir. 1953, 205 F.2d 277, 287, 288; *reversed on other grounds* 347 U.S. 227; *Stoppelli v. United States*, 9 Cir. 1950,

183 F.2d 391, *cert. denied* 340 U.S. 864, *rehearing denied* 340 U.S. 898. The current test is whether '*reasonable minds could find* that the evidence excludes every hypothesis but that of guilt.'"

The conviction as to Count II is *affirmed.*

COUNTS IX and X

Inasmuch as the convictions of Woxberg alone on Counts IX and X resulted in concurrent sentences with Count II, both as to the time to be served and the fine to be paid, it becomes unnecessary for us to pass upon the validity of the Count IX and X conviction. *Sinclair v. United States*, 1929, 279 U.S. 263, 299; *Claasen v. United States*, 1891, 142 U.S. 140, 146-147; *Wilson v. United States*, 1963, 316 F.2d 212, 214.

However, we desire to state the following:

We find no evidence of an essential intent in any "taking" on the part of Woxberg as to these two counts. There was a full explanation of the Jeep transaction on the union's books. When called upon to repay the union, Woxberg did so, at once and in full. It is argued that this payment was only after the government's investigation into the union's affairs had begun. This is true, but it is also true no demand was made for the repayment until after the government started its investigation, and there was no evidence Woxberg, when he paid, knew of the government investigation. Further, the work had been ordered when Woxberg was out of the country. It was Dykes, not Woxberg, who ordered the work. Dykes arranged for the advance from the union. Codefendants Dykes and Hester signed the union's check (Gov.'s Ex. 10). They were acquitted on Counts IX and X.

Appellee makes much of the letter dated April 21, 1961, referring to the $105.86 payment[6] for Woxberg. But Woxberg did not sign that letter.

Again, such procedure as was here followed (advances by the union for personal obligations of its officers—later repaid) took place with frequency—perhaps with too much. But none of this shows the intent to appropriate. We reverse the judgment of conviction of Woxberg as to Counts IX and X.

Reversed as to Count I as to both defendants. Affirmed as to Count II as to both defendants. Reversed as to Counts IX and X as to defendant Woxberg.

[6]Part of the total of $460.86 paid for repairs to the Jeep.